YONG KON FATT & ANOR

v.

HOCK SENG CONSTRUCTION SDN BHD & ANOR

HIGH COURT MALAYA, IPOH
CLEMENT SKINNER JC
[CIVIL SUIT NO: 22-151-94]
14 DECEMBER 1999

CONTRACT: *Sale and purchase of land - Breach - Failure to deliver vacant possession - Application for specific performance - Whether remedy proper - In what circumstances specific performance to be granted - Specific Relief Act 1950, s. 11*

CONTRACT: *Sale and purchase of land - Assignment of rights and interest - Whether legal - Whether deed of assignment valid*

CONTRACT: *Mistake - Mistake as to parcel of land sold - Whether such mistake proved*

CONTRACT: *Damages - Breach - Whether exemplary damages may be pleaded - Circumstances in which exemplary damages may be granted*

This suit revolves around a dispute which arose over the purchase of a two storey shop-house in a development project, the developer of which is a company called Hock Seng Construction Sdn Bhd ('the first defendant'). The purchaser of the shop-house, is Yong Kon Fatt ('the first plaintiff') who subsequently by deed assigned his rights, title and interest in the said property to a company called MG Marketing Sdn Bhd ('the second plaintiff').

The shop-house had been completed but the first defendant had refused to deliver vacant possession thereof to the plaintiffs. The plaintiffs' contention was that they had at all material times been ready and willing to perform their obligations under the sale and purchase agreement including payment of the balance of the purchase price but that in breach of their obligations under the same, the defendants had failed to deliver vacant possession of the said property. The plaintiffs have accordingly brought these proceedings to request the defendants to deliver vacant possession of the said property and for an award of exemplary damages.

The defendants' contention was that: (a) one of the parcels ('PT 16183') was mistakenly sold to the first plaintiff but that the first plaintiff had refused to rectify such mistake; (b) the balance of the purchase price was 'not received' by the first defendant as the first plaintiff was claiming a parcel which had already been sold to someone else; and (c) the first plaintiff had no right to surrender his rights under the sale and purchase agreement to the second plaintiff without the permission of the defendants.

Held:

[1] There was no express prohibition in the sale and purchase agreement against assignment and no evidence was led in support of the contrary. The first plaintiff therefore had the right to assign his rights under the sale and purchase agreement and the deed of assignment was valid.

[2] In relation to the defence of mistake, the defendants had abandoned such defence and this meant that from the very beginning there had never been a mistake about which shop-house had been sold to the first plaintiff. Alternatively, even if the defence of mistake had not been abandoned there was overwhelming evidence from the witnesses and documents that there was in fact no such mistake. Furthermore there was uncontroverted evidence that it was the second defendant who entered into the two agreements with the third party knowing fully well that PT 16183 had already been sold to the first plaintiff.

[3] The defendants' reason for not accepting the balance of the purchase price for the reason that PT 16183 was being wrongfully claimed was no longer good. In fact, the plaintiffs had more than amply demonstrated their readiness and willingness to perform their obligations under the sale and purchase agreement considering that there was no such obligation to do so according to cl. 4 of the agreement, until receipt of a notice requesting such payment accompanied by an architect's or engineer's certificate.

[4] The relief of specific performance is obtained by getting a court to order or direct a party to such contract to perform specific acts which he is obliged under the terms of the contract to do and it would not be fatal to a claim for such relief that it was not heralded by the expression "specific performance". What is required is that the party claiming the relief firstly identifies to the court what it is that he requires the other party to do so as to put him in a position relative to the other which the contract contemplates, and secondly, he sets out in his pleadings the facts that entitle him to such relief. The pleadings in this case showed that the plaintiffs had done both.

[5] Under s. 11(2) of the Specific Relief Act 1950, unless and until the contrary is proved, the court shall presume that breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money, and that breach of a contract to transfer moveable property can be thus relieved.

[5a] The facts disclosed that the conditions required for the presumption were present, namely a contract for the sale of immoveable property and the breach thereof. In addition there was no allegation or evidence that the conduct of the plaintiffs had been such as to not entitle them to the equitable relief they sought.

[6] The plaintiff's right to liquidated damages is a cross-claim which arises out of the same transaction of the first defendant's right to be paid the balance of the purchase price and is so closely connected with it that it would be unjust to order the first plaintiff to pay over to the first defendant a sum without taking into account the amount of liquidated damages due to the first plaintiff. The first plaintiff is therefore allowed to set-off the sum of RM68,331.94 from the sum of RM70,000 still payable to the first defendant.

[7] Exemplary damages are awarded in three categories of cases namely: (a) where there is oppressive, arbitrary or unconstitutional action by a government servant; (b) if the conduct of the defendant is calculated by him to make a profit for himself; or (c) where exemplary damages are authorised by statute.

[7a] Exemplary damages are awarded in cases founded in tort and not for breach of contract. The first plaintiff's claim is pleaded in contract and in essence the relief he seeks is the specific performance of that agreement with an additional claim for damages for breach of that agreement. It was therefore not a claim founded in tort and exemplary damages cannot be awarded in this case.

[Order accordingly.]

Case(s) referred to:

AB v. South West Water Services [1993] QB 507 ***(foll)***

Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 204 ***(foll)***

Broome v. Cassell & Co Ltd & Anor [1972] AC 1027 ***(dist)***

Ching Yik Development Sdn Bhd v. Setapak Heights Sdn Bhd [1997] 1 CLJ 287 ***(dist)***

Foong Chee Chow v. Inspector Mohd Nasir Shamsuddin & Anor [1998] 4 CLJ 309 ***(foll)***

Kenny v. Preen [1963] 1 QD 499 ***(refd)***
Kredin Sdn Bhd v. YTF Investments Sdn Bhd [1998] 1 CLJ 205 ***(dist)***
Lim Kim Swee v. Tan Meng San [1960] 26 MLJ 262 ***(dist)***
Rookes v. Barnard [1964] AC 1129 ***(foll)***
Rosita Amit v. Tan Boon Seng [1989] 2 CLJ 683 ***(dist)***
SEA Housing Corpn Sdn Bhd v. Lee Poh Choo [1982] CLJ 355 ***(dist)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 15(c)
Rules of the Supreme Court, O. 18 r. 8(3)
Specific Relief Act 1950, s. 11(2)

Other source(s) referred to:
Dr Visu Sinnadurai, *Sale and Purchase of Real Property in Malaysia*, p 419
McGregor on Damages, 16th edn, para 431
Meagher, Gunmow & Lehane, *Equity Doctrines and Remedies*, 2nd edn, p 473
Pettit, *Equity and Law of Trusts*, 4th edn. p. 448
Stroud, *Judicial Dictionary*, 3rd edn, vol 2

For the plaintiffs - Nga Hock Cheh (Kelvin Ding); M/s Nga Hock Cheh & Co
For the defendants - CK Leong; M/s CK Leong & Co

Reported by Mariette Peters-Goh

JUDGMENT

Clement Skinner JC:

Introduction

This suit revolves around a dispute which has arisen over the purchase of a two storey shop-house in a development project known as Taman Sentosa, Sitiawan, Perak, the developer of which is a company called Hock Seng Construction Sdn Bhd. (hereinafter the 1st defendant). Taman Sentosa was developed on two parcels of land held under titles lot 16064 and lot 16065 owned by a company called Kiat Poh Realty Sdn Bhd (hereafter the 1st plaintiff) who subsequently by deed assigned his rights, title and interest in the said property to a company called MG Marketing Sdn Bhd (hereafter the 2nd plaintiff). The shop-house has been completed but the 1st defendant has refused to deliver vacant possession thereof to the plaintiffs.

The Facts

Set out below are the relevant facts as I have found them to be; they are either not disputed; are indisputable or where indicated, are accepted by me as proved.

On 15 August 1992 a tripartite agreement (hereafter the sale and purchase agreement) was entered into between the 1st defendant as vendor, the 2nd defendant as proprietor, and the 1st plaintiff as purchaser, whereby the 1st defendant agreed to sell the 1st plaintiff a double storey link shop-house erected on HS(D) Dgs. 3758 PT 16183, Mukim Sitiawan (hereafter the said property) for RM128,000. (the purchase price).

The sale and purchase agreement contains various terms and conditions but for present purposes, it will only be necessary to mention a few, namely:

> Clause 2 thereof, which contains an undertaking by the 1st and 2nd defendant that the said property shall be free from encumbrances immediately prior to the handing over of vacant possession of the said property to the 1st plaintiff;
>
> Clause 4(1) thereof, which provides that the purchase price was to be paid by instalments at the times prescribed in the third schedule to the agreement. Item 2 of the schedule stipulates that the 1st plaintiff's obligation to make such instalment payments only arises upon receipt of a written notice that a particular stage of development is completed;
>
> Clause 4(2) goes on to state that every notice referred to in the third schedule requesting for payment shall be supported by a certificate signed by the vendor's architect or engineer in charge of the housing development;
>
> Clause 20 thereof, wherein the 1st defendant covenanted to complete the shop-house and deliver vacant possession thereof to the 1st plaintiff within 24 calender months from 15 August 1982, failing which the 1st defendant would pay immediately to the 1st plaintiff liquidated damages calculated from day to day at the rate of 10% per annum of the purchase price.

When the sale and purchase agreement was entered into on 15 August 1992, the parties thereto and the lawyer who prepared the agreement namely Chen Hong Eng (hereafter PW1), were able to identify and describe the said property by its document of title, and by reference to a layout plan showing that title number which was attached to the agreement. However, for the circumstances in which the said property came to be selected for purchase, and how PW1 was able to describe in the sale and purchase agreement the actual shop-house being sold, it is necessary to refer to events that occured some nine months earlier. The evidence on this aspect was given by both the 1st plaintiff and PW1, both of whose testimony, on the events about to be referred to, I accept as being unshaken in cross-examination, supported by contemporary documentary evidence identified in this judgment and as being consistent with the truth.

According to the 1st plaintiff, on or about 14 September 1991, he went to the offices of one Wang Su Sing (hereafter Wang). There is evidence given by DW2 Wang Ting Sing that Wang is a common director in both the 1st and 2nd defendant and the person who attended to the purchase of the said property by the 1st plaintiff. At Wang's office, the 1st plaintiff was shown a layout plan of Taman Sentosa, (p. 1 of encl. 56) (hereafter the layout plan) which showed three blocks of shop-houses. During the trial, the parties agreed to refer to these three blocks as Block A, B and C respectively. The 1st plaintiff testified that when Wang showed him the layout plan, each of the individual lots in Block A, B and C were already numbered from 1 to 45, with number 1 starting from the direction of Sitiawan to number 45 ending in the direction of Lumut. The 1st plaintiff then selected Lot 11 in Block A whereupon he made a payment of RM12,800 to Wang and was issued with two separate receipts (pg. 16 of encl. 56). One receipt was issued by a company called Hock Keong Construction, acknowledging payment to it of RM5,000 as "Contract sum 10% for Plot 11", the other receipt was issued by the 2nd defendant acknowledging payment to it of RM7,800 for "land 10% for Plot No. 11."

Soon thereafter, the 1st plaintiff and Wang went to the offices of a lady lawyer, PW1, where the 1st plaintiff instructed her to prepare a sale and purchase agreement for Lot 11. To enable PW1 to do so, Wang gave her a layout plan, now found at p. 302 of encl. 55, which showed the lots contained in Block A, B and C identified by numbers running from 1 to 45. The 1st plaintiff informed PW1 that he had selected Lot 11 in Block A counting from the direction of Sitiawan to Lumut.

PW1, on her part confirms in her evidence what is stated above regarding the layout plan being given to her by Wang and the 1st plaintiff informing her of his selection of Lot 11, counted from the direction of Sitiawan towards Lumut. PW1 testified that based on the above information, she prepared two agreements; one was an agreement whereby the 2nd defendant would sell a plot of land approved for a shoplot to the 1st plaintiff (hereafter the land sale agreement), and the other an agreement between the 1st plaintiff and a company called Hock Keong Construction whereby the 1st plaintiff as 'beneficial' owner of a plot of land approved for a shoplot engaged Hock Keong to construct a shop-house thereon (hereafter the building agreement). What is relevant about these two agreements is that PW1 explained that when they were prepared and entered into on 19 September 1991, qualified title to the subdivided lots in Taman Sentosa were not issued yet. Therefore, according to PW1, in these two agreements, the description of the plot of land sold and upon which the shop-house was to be constructed was achieved by reference to the lot number stated

in the layout plan supplied by Wang. Both the land sale agreement and the building agreement refer to Lot 11, identified on the layout plan annexed to each agreement, as the plot sold to 1st plaintiff.

PW1 further explained in cross-examination and re-examination, and I accept her explanation, that it was intended and agreed by the parties that when the document of title was issued to Lot 11, another agreement to supersede the land sale agreement and building agreement would be entered into between the parties in accordance with Schedule 'G' of the Housing Developers (Control and Licencing) Act 1966 and Regulations made thereunder, in which agreement, the issued document of title to Lot 11 would be identified so that when the purchaser applies for a bank loan, there would be no problem to identify the property to be charged to the bank. According to PW1 this *modus operandi* of first entering into the two agreements followed by a schedule 'G' agreement was not confined to the transaction between the 1st plaintiff and defendants only but was adopted for many other purchasers in Taman Sentosa and as an example she referred to those agreements found at pp. 161, 166 and 173 of encl. 55, the Agreed Bundle of Documents.

Continuing with the narrative, by August 1992, the documents of title to the subdivided lots in Taman Sentosa must have been issued because on 15 August 1992, the said sale and purchase agreement which adopts the schedule 'G' format was executed by the parties wherein the said property was identified no longer as lot 11 but PT 16183. It is the evidence of PW1, and again I accept her evidence, that before she prepared the said sale and purchase agreement for execution, she was furnished with two documents by Wang who came to her office to deliver them; they were a copy of the layout plan now found at p. 15 of encl. 55, and the title deed to PT 16183. Subsequently when the said sale and purchase agreement was sent to the defendants for execution, the particulars identifying the property sold had already been inserted in the agreement. PW1 also prepared the memorandum of transfer found at p. 309 to 312 of encl. 55 which was executed by the 2nd defendant transfering the said property to the 1st plaintiff who has accepted such transfer on 19 August 1992. PW 1 confirmed that all the particulars in the memorandum of transfer were filled in before it was sent to the 2nd defendant for execution and that this memorandum of transfer has been duly adjudicated for stamp duty purposes. PW1 is quite certain in her testimony that even though the parties had entered into the land sale agreement and building agreement first and later followed by the sale and purchase agreement, there was no change in the location of the property chosen by the 1st plaintiff.

The defendants did not lead any evidence from either of its two witnesses on this aspect of the case. The evidence of PW1 and the 1st plaintiff relating to the selection of the said property and the entering into of the sale and purchase agreement wherein the said property is properly identified therefore stood uncontradicted. That was another reason why I accepted their evidence.

In so far as payment of the purchase price for the said property is concerned, it will be recalled that upon selecting lot 11, the 1st plaintiff paid RM12,800 to Wang for which the 1st plaintiff received two receipts. Thereafter, there is ample evidence to show that prior to the execution of the said sale and purchase agreement, the 1st plaintiff had on 1st August 1992 paid RM12,800 to the 1st defendant for which a receipt was issued acknowledging the amount as payment of "20% progress payment for PT 16183, Taman Sentosa, Mukim Sitiawan". After the execution of the sale and purchase agreement, the 1st plaintiff made a further progress payment of RM12,800 on 15 September 1992 to the 1st defendent who issued a receipt acknowledging the sum was paid as "30% progress payment for PT 16183 Taman Sentosa, Mukim Sitiawan". On the same date, the 1st plaintiff lodged a caveat against the said property to protect his interest therein. A further progress payment was made by the 1st plaintiff on 21 October 1992 to the 1st defendant, who issued a receipt acknowledging such payment as "45% progress payment for PT 16183, Taman Sentosa, Mukim Sitiawan". All these receipts which are found at pp. 314 and 315 of encl. 55 were referred to the court by the 1st plaintiff. The above facts show that from the time of selection of the shop-house till payment of 45% of the purchase price therefore, there was no hint of any problems between the parties to the sale and purchase agreement and neither was there any indication that a mistake had been made regarding the property sold.

After paying 45% of the total purchase price by 21 October 1992, the 1st plaintiff did not receive any further demand from the 1st defendant for the payment of the balance of the purchase price and this situation continued for the next 19 months until 13 July 1994 when it was the 1st plaintiff who took steps to tender payment of the same to the lst defendant on two occasions but without success. Before describing those attempts, this would be an appropriate place to describe what was happening to the said property in those 19 months.

PW3, Cik Hadzirah bt. Mohd. Nordin, the Technical Assistant at Majlis Daerah Manjung, testified that on 9 April 1993, the 1st defendant submitted amended building plans to construct an additional third floor to those shop-houses constructed on PT 16184 to PT 16193 inclusive in Block A. Those

PT's included PT 16183 ie, the said property. According to PW3, the amended plans were approved on 24 December 1993. Some three months after the 1st defendant had submitted the amended building plans, the 2nd defendant on 9 July 1993 entered into a lease agreement with a supermarket called Pasaraya Matahari Sdn. Bhd. (hereafter Pasaraya Matahari) whereby 15 units of shop-houses in Block A, including the said property, were let out for a period of 15 years from the date of issuance of an occupation certificate for the said shop-houses (p. 195 to 199 of encl. 55). On 15 September 1993, a supplementary agreement was entered into between the same parties reducing the number of units leased from 15 to 10. The said property was one of the excluded units but Pasaraya Matahari was given a first option to lease PT 16183. Evidence in relation to the above dealings was elicited during the cross-examination of DW2.

PW1 testified that sometime after the sale and purchase agreement was entered into and at a very late stage in the transaction, Wang went to PW1's office to request her to ask the 1st plaintiff to change the lot he (1st plaintiff) had bought to another lot but Wang did not give her any reason for this request and neither did Wang inform her that a mistake had been made in the shop-house sold to the 1st plaintiff. PW1 testified that she conveyed the request to the 1st plaintiff. The 1st plaintiff on his part testified that at the request of Wang he (the 1st plaintiff) met him (Wang) one evening at a nightspot when Wang requested the 1st plaintiff to "give back PT 16183" in exchange for another shop-house and RM20,000 in compensation. According to the 1st plaintiff, Wang wanted PT 16183 back so that he could build a third storey to it so that it could be rented out to a supermarket.

Instead of agreeing to Wang's suggestion, the 1st plaintiff took steps to tender the balance of the purchase price to the 1st defendant. It is the testimony of PW1 that when the said property was purchased by the 1st plaintiff, she had conducted a search at the land registry to ascertain whether there were any encumbrances against the same. The search revealed none. When the 1st plaintiff wanted to pay the balance of the purchase price, a second search was claiming to be the purchaser of the said property. According to the 1st plaintiff, he instructed his present solicitors to tender payment of the balance of the purchase price to the 1st defendant. On 13 July 1994, Messrs Nga Hock Cheh & Co. wrote to the 1st defendant's solicitors, Messrs Hong Chew King & Co. forwarding a cheque for RM470,400. In payment of the balance of the purchase price and in return requesting the 1st defendant's solicitors for the following documents a withdrawal of the offending caveat lodged against PT 16183 registered under Presentation No. 1004/94 Jilid 912, Folio 14; the certificate

of fitness for occupation in respect of the said property and all the keys to the said property (p. 316 of encl. 55). On the same day, the 1st defendant's solicitors returned the said cheque to the 1st plaintiff's solicitors on the grounds that they no longer acted for the 1st defendant in respect of the said land. One week later, on 20 July 1994 the 1st plaintiff's solicitors wrote direct to the 1st defendant informing them about the tender of the balance of the purchase price to Messrs Hong Chew King & Co. but its return for the reasons already stated that the balance of the purchase price had been deposited at Messrs Nga Hock Cheh & Co. with instructions to release the same to the 1st defendant in the said property and all keys to the same and that the 1st defendant was accordingly requested to call at the 1st plaintiff's solicitors' office within seven days of the letter for the purposes abovementioned (p. 317 of encl. 55). The 1st defendant have not done so.

It is the 1st plaintiff's testimony that the 1st defendant refused to accept payment of the balance of the purchase price because Wang wanted him (lst plaintiff) to give back the said property to the 1st defendant so that a third storey could be built to PT 16183 and then let out to Pasaraya Matahari. It should be noted that this testimony of the 1st plaintiff was not challenged when he was being cross-examined, instead questions were put to the 1st plaintiff to suggest that instead of PT 16183, a different shop-house identified as PT 16159 had been sold to him. This was firmly denied by the 1st plaintiff. I accept the testimony of the 1st plaintiff on why the 1st defendant refused to accept the payment of the balance of the purchase price in 1994, it is corroborated by those parts of the evidence of PW1, PW3 and DW2 which I have already set out earlier. I also accept the testimony of the 1st plaintiff on this point because as will be seen shortly, there was actually no mistake as to which shop-house had been sold to the 1st plaintiff.

For completeness, it should be mentioned here that even after this trial had commenced, the plaintiffs had through their solicitors Messrs Nga Hock Cheh & Co. attempted by letter dated 30 April 1999 (p. 10 encl. 56) to tender a cheque in payment of the balance of the purchase price to the 1st defendant's present solicitors Messrs C.K. Leong & Co. but the latter have by letter dated 3 May 1999 returned the payment for the reason that they have no instructions to accept payment.

The Contentions

It is the contention of the plaintiffs that they have at all material times been ready and willing to perform their obligations under the sale and purchase agreement including payment of the balance of the purchase price but that in breach of their obligations under the same, the defendants have failed to deliver vacant possession of the said property. The plaintiffs have accordingly brought these proceedings to request that the defendants do deliver vacant possession of the said property. The plaintiffs also claim damages and during the trial the 1st plaintIff gave evidence that under the terms of the sale and purchase agreement, the defendants are obliged to pay agreed and liquidated damages at the rate of RM35.06 a day after 14 August 1994 when vacant possession was to be delivered. As at 22 April 1999, the amount payable by the defendants amounted to RM60,072.32. The plaintiffs say they should be allowed to set-off this sum from the balance of the purchase price. In addition to liquidated damages, counsel for the plaintiffs in submissions requested for exemplary damages to be awarded against the defendants.

The defendants have refused to deliver vacant possession of the said property and in their amended defence say why. In a nutshell the defence is:

(a) as a result of unintentional mistake, instead of PT 16159 being inserted in the said sale and purchase agreement to describe the property sold, PT 16183 was inserted. PT 16183 having been already sold to someone else. After the mistake was discovered PW1 was requested to rectify the mistake but the 1st plaintiff refused;

(b) that the balance of the purchase price was "not received" by the 1st defendant as the 1st plaintiff was claiming PT 16183 instead of PT 16159 which was the shop-house purchased by him;

(c) that the 1st plaintiff had no right to surrender his rights under the sale and purchase agreement to the 2nd plaintiff without the permission of the defendants, and, the deed of assignment is void and bad in law.

After the plaintiffs had closed their case and whilst DW2 was being subjected to some severe cross-examination, learned counsel for the defendants informed the court that the defendants were not disputing that PT 16183 was the lot sold to the 1st plaintiff in accordance with the law. This admission was reconfirmed during submissions when learned defence counsel stated that the defence of mistake was abandoned. With the above admission, the mainstay of the defence was gone, learned defence counsel

submitted however that there were still three other defences open to the defendants which would entitle them to defeat the claim of the plaintiffs. They were: (a) which of the plaintiffs had the right to sue in view of the assignment; (b) whether a claim is disclosed against the 2nd defendant; and (c) there has been no tender of the balance of the purchase price by the plaintiffs to entitle the plaintiffs to request performance from the defendents

I now consider these defences and the evidence relating to each.

The Plaintiffs' Right To Sue

It is the contention of the defendants that if there has been an absolute assignment by the 1st plaintiff of his rights under the sale and purchase agreement to the 2nd plaintiff, then the 1st plaintiff cannot sue, if he has not, then the 2nd plaintiff cannot sue. It is counsel's submission that the rightful plaintiff is the 2nd plaintiff but he does not give any reasons to support this submission but has cited in support the cases of *Kredin Sdn. Bhd. v. YTF Investments Sdn. Bhd.* [1998] 1 CLJ 205 and *Rosita bte Amit v. Tan Boon Seng* [1989] 2 CLJ 683.

The 2nd plaintiff gave evidence through its director Datuk Cheong Kong Leong (PW4) who testified that not withstanding the assignment, the 1st plaintiff was authorised to bring and maintain this action and referred to two deeds of assignment signed between the 1st and 2nd plaintiff, the first dated 4 September 1993 and the second a supplemental deed dated 12 October 1995. These are found at p. 318 to 324 of encl. 55. When these deeds are read, they confirm the evidence of PW4. The supplemental deed also makes it clear that the assignment by the 1st plaintiff of his rights under the sale and purchase agreement is not an absolute one but is conditional upon the events stated therein which have not come to pass yet. In those circumstances, I find no merit in the submission of counsel that it is only the 2nd plaintiff who is the proper plaintiff. In so far as the authorities relied on by counsel for the defendants is concerned, the facts of *Rosita bt. Amit v. Tan Boon Seng (supra)* are distinguishable. In that case, the defendant having assigned his property to the bank as security for a loan, resold the property to the plaintiff without the consent of the bank. When the plaintiff brought an action against the defendant for specific performance, the bank applied and was allowed by the court to be joined as a party to the suit and in so doing the learned judge observed that during the subsistence of the assignment in favour of the bank, the plaintiff could not sue the defendant for specific performance – all the rights, title and interest of the defendant in the property having been assigned to the bank. Such a position does not attain in our case where it is the 1st and 2nd plaintiffs who bring this suit to claim delivery of possession.

With regard to the reliance by the defendants on the case of *Kredin Sdn. Bhd. v. YTF Investments Sdn. Bhd. (supra)* and in particular to the *obiter* opinion reported in the headnotes, again I would say that what was stated there has no application to our case because as already mentioned earlier, the supplemental deed of assignment allows for this action to be brought by the 1st plaintiff.

In so far as the pleaded defence on this point is concerned, namely, that the 1st plaintiff had no right to assign his rights under the sale and purchase agreement and that the deed of assignment is void; quite apart from the fact that there is no express prohibition against assignment in the sale and purchase agreement, the defendants have led no evidence in support of this defence and neither has counsel for the defendants made any submission on it. I accordingly find such defence not made out.

Is A Case Disclosed Against The 2nd Defendant?

It is the submission of counsel for the defendants that the 2nd defendant may have been the landowner but it was not the vendor of the said property. In so far as compliance with the terms of the sale and purchase agreement is concerned, counsel submitted that by delivering the title deed and memorandum of transfer to the 1st defendant whose obligation it is to hand them over to the correct purchaser, the 2nd defendant has fulfilled its obligations. As such submits counsel, there is no case disclosed against the 2nd defendant. The answer to that submission lies in whether it accurately reflects the obligations of the 2nd defendant under the sale and purchase agreement. The submission of counsel suggests that apart from the abovementioned obligation, the sale and purchase agreement imposes no other obligations on the 2nd defendant. I find that this submission flies in the face of cl. 2 of the sale and purchase agreement which imposes an obligation on the 1st and 2nd defendant not to subject the said land ie, PT 16183 to any encumbrance without the prior approval of the purchaser. In the same clause the 1st and 2nd defendant undertook that the said property shall be free from encumbrances immediately prior to the handing over of vacant possession of the same to the purchaser. So, the question that must be asked is what constitutes an encumbrance for the purposes of this clause? The sale and purchase agreement itself does not define the word "encumbrance". However, in Stroud's *Judical Dictionary*, 3rd edn. vol. 2, included in the definition of "Encumbrance" is the following descriptions "A lease is an encumbrance if a vendor has contracted to give vacant possession". Clause 2 of the sale and purchase agreement of course contains such a covenant, and, it has been pleaded by the plaintiffs in para. 6 of the amended statement of claim that the defendants have in breach of the said agreement:

(a) failed to deliver vacant possession of the said property to the 1st plaintiff;

(b) wrongfully leased the said property to a third party without the consent of the 1st plaintiff.

In reply to this allegation, the 1st defendant in para. 6 (a) of their amended defence admitted that the said property had been leased out to a third party but maintain that the 1st defendant was entitled to do so. A proper reading of para. 6 of the defence and especially sub-para (d) shows that that defence was pleaded on the basis that what was sold to the 1st plaintiff was not PT 16183 but PT 16159 and therefore the 1st defendant was entitled to lease out PT 16183 to a third party.

I find however that this defence is not maintainable because: firstly, once the defendants had abandoned the defence of mistake, this meant that from the very beginning there had never been a mistake about which shop-houses had been sold to the 1st plaintiff; and secondly, I find that even if the defence of mistake had not been abandoned, there was overwhelming evidence adduced through PW1, and the 1st plaintiff and from the documents already referred to in evidence that there was no such mistake. Quite apart from the above, there is the uncontroverted evidence that it was the 2nd defendant who entered into the two agreements with Pasaraya Matahari concerning PT 16183, knowing full well through Wang that PT 16183 had already been sold to the 1st plaintiff. In my judgment, a case had been more than made out against the 2nd defendant; in fact the 2nd defendant did not deny the allegation of breach contained in para. 6 of the amended statement of claim. In not having done so, they must be taken to have admitted such breach.

There Has Been No Tender Of The Balance Of The Purchase Price

Learned counsel for the defendants adopted a two-pronged argument here. It was firstly submitted that as the plaintiffs have not tendered the balance of the purchase price to the 1st defendant, they have no right to enforce the sale and purchase agreement. In support learned defence counsel relied upon the case of *Ching Yik Development Sdn. Bhd. v. Setapak Heights Sdn. Bhd.* [1997] 1 CLJ 287. It was next argued that even if there had been a valid tender, the plaintiffs are not entitled to any remedy as they have not prayed tor specific performance of the agreement or at least the substance of it. According to counsel for the defendants, what the plaintiffs have prayed for is for possession of the said property, but submits counsel, possession is consonent with ownership and unless you obtain ownership, you cannot pray for possession; and to obtain ownership you have to pray for a transfer of the said property first, which the plaintiffs have not done.

I shall now consider each of these arguments.

Having looked at the defence carefully, I cannot find any averment in it raising the plea that there has not been a valid tender of the balance of the purchase price. It is of course a fundamental principle that a party is bound by its pleadings. Giving effect to that principle, I hold that it is not open to the defendants to avail themselves to this defence or to raise any submissions or argument on it. A second reason for not allowing this submission to be raised is because it is inconsistent with what is already pleaded. If para. 3 of the amended defence is looked at, the 1st defendant openly says that it refused to accept the balance of the purchase price because the 1st plaintiff was claiming PT 16183 instead of PT 16159. Although the 1st defendant has not used the words "refused to accept" in para. 3 of its defence, they use the words "not received" but anyone reading para. 3 cannot but conclude that they mean the same thing. It is evident to me that notwithstanding the 1st defendant's play with words in their defence, the true purport of para. 3 of the defence is that the 1st plaintiff's tender of the balance of the purchase price was not accepted by the 1st defendant for the ostensible reason that PT 16183 was being wrongfully claimed, a reason that no longer holds good. Being inconsistent with what the 1st defendant had admitted to in its pleadings by which it is bound, it would be wrong to allow the defendants to depart from the same.

I would also, with respect, reject the submission of no valid tender of the balance of the purchase price as being untenable in the circumstances of this case. This is a case in which the parties had entered into an agreement and their obligations to each other thereunder must be dictated by the terms thereof. Pursuant to the terms and conditions of the sale and purchase agreement and in particular cl. 4 thereof, there is no obligation on the part of the 1st plaintiff to pay any part of the purchase price until he receives a notice requesting such payment accompanied by an architect's or engineer's certificate and no evidence was adduced by the defendants to show that such notice accompanied by the requisite certificates had been issued to the 1st plaintiff, so that an obligation to tender the balance of the purchase price on the part of the 1st plaintiff had arisen. What the evidence adduced does show is that it was the 1st plaintiff who was keen to pay the balance of the purchase price, even though no obligation to do so had arisen under cl. 4 of the sale and purchase agreement, and that two attempts to do so were made in 1994 before bringing action but each attempt was either rejected or ignored. In my judgment in having walked that extra mile when there was no obligation to do so, the plaintiffs have more than amply demonstrated their readiness and willingness to perform

their obligations under the sale and purchase agreement. It is for the above reasons that I agree with the submission of counsel for the plaintiffs that the facts of our case are so clearly distinguishable from the facts in the case of *Ching Yik Development Sdn. Bhd. v. Setapak Heights Development Sdn. Bhd. (supra)* that the principles stated in that case have no application here. In *Ching Yik*'s *case*, the purchaser of the property had defaulted in the payment of the balance of the purchase price on its original due date. Subsequently, the purchaser tendered a cheque in payment of the balance of the purchase price outside the stipulated completion date and the tender of such payment was accepted by the vendor but the purchaser stopped payment of the cheque without a valid reason as a result of which the vendor refused to forward to the purchaser's solicitors the duly executed memorandum of transfer. The purchaser then brought an action for specific performance but it was struck out by the learned judicial commissioner; on appeal, it was held, *inter alia*, that the stipulation as to the payment of the purchase price was a fundamental term and that the purchaser's failure to pay the purchase price was fatal to his action. There has been no such failure in our case; as I indicated when setting out the facts earlier, I accept the testimony of the 1st plaintiff on why the 1st defendant refused to accept payment of the balance of the purchase price.

The defendants also rely on two other cases in support of their submission of no valid tender; the first is the case of *Lim Kim Swee v. Tan Meng San* [1960] 26 MLJ 262, but again a reading of that case shows that the facts of that case are clearly distinguishable from those in our case because in that case, the consideration for the sale of the property was distinctly divided into two parts; one part was the payment of some money to B. Kaher Singh and the other part was the satisfaction of a debt owed to one Coelho who at that time was the chargee of the land. Without having paid the said Coelho, the purchaser brought an action for specific performance alleging that he was at all times willing and ready to perform his part of the agreement. It was held by the learned judge that the requirement to pay Coelho was a stipulation that required actual performance and not merely a willingness to perform on the part of the purchaser and as Coelho had not been paid prior to the commencement of the action, it must fail. On appeal, Thomson CJ upheld the decision of the learned judge and held that the purchaser had no cause of action until his part of the contract was performed. That is clearly not the position that prevails in our case. As I have already said earlier, no obligation had arisen under the terms of the sale and purchase agreement for the 1st plaintiff to pay the balance of the purchase price and therefore the question of actual performance on the part of the 1st plaintiff has not arisen in our case.

The second case relied upon by the defendants is the decision in Ipoh High Court Civil Suit No. 22-152-94, in which the present 1st defendant was sued by another purchaser of a shop-house in Taman Sentosa for specific performance of a sale and purchase agreement but refused such relief by the learned judge on the grounds that there had not been a tender of the balance or the purchase price. A reading of that judgment shows that in arriving at his decision, the learned judge had relied on the decision in *Ching Yik Development Sdn. Bhd. v. Setapak Heights Development Sdn. Bhd. (supra)* However, as I have already pointed out, the facts of our case are clearly distinguishable from those in *Ching Yik*'s *case* and hence the principles there stated have no application in our case. It would also appear from the judgment in CS. 22-152-92 that the issue of whether it was open to the defendant there to raise the plea of no tender or whether any obligation to pay the balance of the purchase price had even arisen, was not canvassed before the learned judge as now raised in this case. For the reasons given above, I must very respectfully decline to follow the decision in CS. 22-152-92.

I now address the submission by learned defence counsel that because the plaintiffs have not prayed for specific performance, they are not entitled to claim delivery of possession of the said property.

To determine the correctness of this submission, it would be helpful to consider first the Rules of the High Court and then the nature of the equitable remedy of specific performance. O. 18 r. 15(C) of the Rules or the High Court 1980 reads:

> A statement of claim must state specifically the relief or remedy which the plaintiff claims, but costs need not be specifically claimed.

Pettit, *Equity and Law of Trusts*, 4th edn. p. 448 describes specific performance as "an Order of the Court directing a party to a contract to perform his obligations thereunder according to its terms." Again, in *Equity Doctrines and Remedies* by Meagher, Gunmow & Lehane, 2nd edn. p. 473, the learned authors in discussing the nature of the remedy of specific performance in executory and executed contracts state:

> An executory contract is one which requires the execution of an instrument, or the doing of an 'act in the law', which will put the parties in the position relative to each other which the contract contemplates. The typical example of an executory contract in this sense is an agreement to assure an interest in property. A contract to sell land, for instance, requires the execution of a conveyance or transfer; ... . When a court directs a party to such a contract to peform his obligations thereunder according to its terms, that is a decree of specific performance. An executed contract is one which does

not require the execution of an instrument or the doing of an act in the law, for the purpose of placing the parties in the position contemplated: the contract itself does so.

What emerges from a reading of O. 18 r. 15(c) RHC and the above passages is that in relation to an executory contract, the relief of specific performance is obtained by getting the court to order or direct a party to such contract to perform specific acts which he is obliged under the terms of the contract to do and it would not, in my opinion, be fatal to a claim for such relief that it is not heralded by the expression "specific performance"; what is required is that the party claiming the relief firstly identifies for the court what it is that he requires the other party to do so as to put him in a position relative to the other which the contract contemplates and secondly, he sets out in his pleadings the facts that entitle him to such relief. The pleadings in this case show that the plaintiffs have done both.

Reverting to the facts of our case, the sale and purchase agreement is clearly an executory contract which requires the doing of several acts by the 1st defendant, one of which is the delivery of vacant possession to the 1st plaintiff. Bearing in mind that PW1 had already been given custody of the title deed to PT 16183 when the sale and purchase agreement was entered into, the following facts set out in the statement of claim make it plain why the plaintiffs only seek an order for possessions: (a) the 1st plaintiff is already in possession of a duly signed and adjudicated memorandum of transfer of the said property (para. 4); (b) the construction of the shop-house has been completed (para. 5); (c) the plaintiffs are ready and willing to perform their obligations under the said agreement (para. 7); (d) by para. 8 thereof, the only act the plaintiffs require the defendants to do is to deliver vacant possession of the said property. In my judgment, on the particular facts of this case, the plaintiffs' prayer for delivery of possession being supported by facts pleaded in the statement of claim is sufficient to secure for the plaintiffs the relief they seek.

As regards the submission that the plaintiffs cannot claim possession without first praying for a transfer of the said property, I regret that I find no merit in this submission because it ignores the fact that the plaintiffs are already in a position to put themselves on the register as owner, being in possession of the title deed and duly executed memorandum of transfer to the said property and therefore do not need to pray for a transfer as now suggested by counsel.

It was lastly submitted by learned counsel for the defendants that the claim for delivery of possession is premature because specific performance is not an automatic remedy but one only of the remedies available at the discretion of the court. Learned defence counsel went on to submit that before the court orders specific performance, it should consider four matters, namely, balance of convenience, hardship, readiness and ability of the plaintiff to perform his contract and whether damages are an adequate remedy. Counsel for the defendants however did not go further and refer to any evidence or make any submission on these four matters apart from saying that the 1st defendant is prepared to pay damages. I find that this submission of counsel must be viewed against the provisions of s. 11(2) of the Specific Relief Act 1950 (the Act) which reads:

> Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.

On his part, learned counsel for the plaintiffs referred to the *Sale and Purchase of Real Property in Malaysia* by Dr. Visu Sinnadurai where at p. 419, the learned author had this to say with regard to s. 11(2) of the Acts:

> Section 11(2) of the Specific Relief Act makes statutory provision for the equitable rule that until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by damages or compensation in money. Therefore, in cases where specific performance is sought, there is a presumption that damages would not be adequate and the contract should be specifically enforced. The burden of rebutting this presumption is on the defendant.

I respectfully agree with that passage. Reverting to the facts of this case, I am satisfied that the conditions required for the presumption under s. 11(2) of the Act to come into play are present here, namely, a contract for the sale of immovable property and the breach thereof. In addition thereto, there is no allegation or evidence that the conduct of the plaintiffs have been such as to disentitle them to the equitable relief they seek. The next question then is, have the defendants rebutted the presumption? I find that all that the defendants have done to rebut the presumption under s. 11(2) of the Act is to make submissions on principles of law, which in my view is insufficient to discharge the burden which the law has placed on them. In any event, I am quite satisfied from the facts already known to the court, namely that there was no mistake in the identity of the property sold; that the 1st defendant knowingly refused to accept the balance of the purchase price; that despite their contractual obligation to

deliver vacant possession of the said shop-house yet letting out the same, all goes to show that the balance of convenience and hardship do not favour the exercise of discretion in favour of the defendants.

I am accordingly satisfied that the plaintiffs have on a balance of probabilities proved their claim against the defendants and that the plaintiffs are entitled to an order that the defendants do deliver vacant possession of the said property to the plaintiffs. Before turning to the question of damages, I wish to say that with regard to the defence case, the defendants called two witnesses to testify. Unfortunately both these witnesses admitted that they had no personal knowledge of the sale of the said property to the 1st plaintiff and what evidence they did give was of no or very little relevance to the matters on which counsel for the defendants rested his submissions on. Consequently I could give their evidence very little if any weight at all.

Damages

There is finally the question of damages. Although the statement of claim requires that damages be assessed, counsel for the plaintiffs indicated that he would deal with and adduce evidence regarding damages during the trial and to that extent indicated that the plaintiffs were not only seeking agreed and liquidated damages but also exemplary damages as well. I will therefore consider the question of damages in this judgment rather than have it assessed before a registrar.

First, agreed and liquidated damages. In submission, counsel for the defendants agreed that liquidated damages were payable but that if the plaintiffs receive such damages they cannot receive other damages and certainly not exemplary damages when it has not been pleaded. In view of the above concession and the fact that counsel for the defendants made no submission on the matter, it must be taken that the 1st defendant regards the sum payable in accordance with cl. 20 of the sale and purchase agreement as the amount of reasonable compensation payable to the 1st plantiff for breach of their obligation to deliver vacant possession. The 1st plaintiff in evidence stated that pursuant to cl. 20, the 1st defendant agreed to pay liquidated damages calculated from day to day at the rate of 10% per annum of the purchase price which works out to RM35.06 per day. I accordingly order that the 1st defendant do pay the 1st plaintiff liquidated damages at the rate of RM35.06 commencing from 14 August 1994 till today which works out to RM68,331.94. In view of my above award, there will be no necessity to consider whether counsel for the plaintiff's submission on whether the provision of the Housing Developers (Control and Licencing) Act 1966 and Regulation made thereunder apply to the sale and purchase agreement herein.

Set-off

Counsel for the plaintiff submitted that instead of the 1st plaintiff having to pay the 1st defendant the balance of the purchase price amounting to RM70,400 the court should allow the 1st defendant to set-off the liquidated damages against the balance of the purchase price. In support Counsel referred to the case of *S.E.A. Housing Corporation Sdn. Bhd. v. Lee Poh Choo* [1982] CLJ 355. That was a case in which the respondent had purchased a shop-house from the appellant developer who was to complete and deliver possession thereof within 18 months of the sale agreement but did not do so until some 23 months after the due date. The sale agreement contained a stipulation for payment of liquidated damages for delay of completion. When the shop-house was completed and the appellant requested for payment of the balance of the purchase price amounting to RM17,907.20, the respondent maintained that the amount due to her as liquidated damages amounted to some RM27,826.66 and therefore she was entitled to set-off her cross claim against the amount due to the appellant whereafter the appellant should pay her the balance of RM9,919.46 and hand over possession and the keys to the shop-house. When the appellant refused to do so, the respondent brought an action claiming *inter alia* the sum of RM9,919.46 (ie, after set-off), delivery of possession of the shop-house and its keys and delivery of the documents of title. The respondent was granted such relief by the High Court. On appeal one of the issues raised was whether in withholding payment of the last installment due, did the respondent commit breach of the sale agreement ie, whether the respondent could set-off the liquidated damages payable to her against the last payment. In holding that the respondent did not commit any breach of the agreement, Suffian LP in delivery of the judgment of the Supreme Court said at p. 34:

> The plaintiff's cross-claim and the defendant's claim arise out of the same transaction and are so closely connected with the defendant's demand that it would be manifestly unjust to allow the defendant to enforce payment without taking into account the plaintiff's cross-claim.

I do appreciate that the facts in *S.E.A. Housing* and the facts here are distinguishable in that no demand has been made by the defendants in our case for the balance of the purchase price but it is the *ratio* in the above quoted passage that I believe is applicable to our case, in that the 1st plaintiff's right to liquidated damages is a cross-claim which arises out of the same transaction as the 1st defendant's right to be paid the balance of the purchase price and is so closely connected with it that it would be manifestly unjust if I were to order that the 1st plaintiff should pay over to the 1st defendant the sum of RM70,400 without taking into account the

amount of liquidated damages due to the 1st plaintiff. In the circumstances, I allow the 1st plaintiff to set-off the sum of RM68,331.94 from the sum of RM70,400 still payable to the 1st defendant.

Exemplary Damages

As regards the plaintiffs' claim for exemplary damages, it is the submission of counsel for the defendants that as the plaintiffs did not expressly plead their claim for exemplary damages, it cannot be awarded. Counsel for the plaintiffs on the other hand submitted that there is no need to expressly plead a claim for exemplary damages and that following the decision of *Rookes v. Barnard* [1964] AC 1129, exemplary damages are awarded in three categories of cases: (a) where there is oppressive, arbitrary or unconstitutional action by a government servant; (b) if the conduct of the defendant is calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiffs; and (c) where exemplary damages are authorised by statute. It is the submission of counsel for the plaintiff that the defendants in knowingly and wilfully attempting to lease out the said property first to Pasaraya Matahari and more recently to a car dealer have conducted themselves in such an outrageous and unscrupulous manner that the court should punish the defendants by an award of exemplary damages against them to vindicate the strength of the law since the act of the defendants was so clearly calculated to make a profit for themselves by delaying delivery of possession to the plaintiffs.

The position in Malaysia appears to be that a party claiming exemplary damages need not expressly plead it, unlike the position in England where following the recommendations of Lord Hailsham LC in the case of *Broome v. Cassell & Co. Ltd. & Anor* [1972] AC 1027, the Rules of the Supreme Court were amended so that by O. 18 r. 8(3) it is now a requirement that a claim for exemplary damages must be specifically pleaded together with the facts on which the plaintiff relies. In my view, notwithstanding our present position, a party claiming exemplary damages is not relieved from complying with the other principles of pleadings, namely that a defendant is to know from the earliest possible moment what is alleged against him; what case he has to meet and what relief is sought against him, so that in an appropriate case justice may require that exemplary damages be refused if it has not been pleaded as was the case in *Foong Chee Chow v. Inspector Mohd. Nasir bin Shamsuddin & Anor* [1998] 4 CLJ 309.

Having stated the above, I find that a decision on whether or not exemplary damages should be awarded to the plaintiffs will not turn on whether the plaintiffs have expressly pleaded it or not; rather it will turn on whether exemplary damages are available in a case pleaded in contract only where there is no allegation that the defendants have committed a tort against the plaintiffs.

McGregor on Damages, 16th edn, in para 431 traces the historical justification for exemplary damages and stated:

> In the 1760s exemplary damages first made their appearance on the English legal scene. The earliest cases arose in the cause celebre of John Wilkes and the North Briton. In the government's effort to stop the North Briton from being published, a variety of individuals suffered interference at the hands of public officials and in two tort actions of 1763 based upon such interference, *Huckle v. Money* and *Wilkes v. Wood,* awards of exemplary damages were made. By the end of the decade further awards had appeared in other contexts, and thereafter exemplary damages became a familiar feature of tort-though never contract-law, being awarded not only in cases of assault, false imprisonment, defamation, seduction and malicious prosecution but also in cases of trespass to land and, eventually, trespass to goods.

The law regarding the award of exemplary damages took a drastic change in the 1960s when in the case of *Rookes v. Barnard,* the House of Lords took the opportunity to review the whole doctrine and held that the award of exemplary damages should be made only in the three categories of cases I have already referred to earlier in this judgment.

McGregor then goes on to state the present position in para. 440 in these words:

> Exemplary awards are therefore now to be confined basically to the torts of trespass, whether to the person or to property, defamation and false imprisonment; private nuisance is probably included but not, curiously, malicious prosecution ... .

McGregor then goes on to discuss the further restriction made on the award of exemplary damages for the tort of deceit and torts involving discrimination by the case of *A.B. v. South West Water Services* [1993] QB 507 CA, and continues at para. 443 to state:

> In addition to these two exclusions from the exemplary damages net, it is clear that awards of exemplary damages will not be available in negligence, however gross, or public nuisance – *A.B. v. South West Water Services* so decides-or in conversion, **and certainly not for breach of contract where the writ of exemplary damages has never been allowed to run.** (emphasis added)

Thus whilst from the beginning until today, exemplary damages have been awarded in cases founded in tort, it has not been awarded for breach of contract. Reverting now to the question at hand, the 1st plaintiff's claim is pleaded in contract and in essence the relief he seeks is the specific performance of that agreement with an additional claim for damages for breach of that agreement. It is not a claim founded in tort and counsel in claiming exemplary damages has not alleged any tortious act committed against the plaintiffs and in not having done so I doubt punative or exemplary damages can be properly awarded in this case: See *Kenny v. Preen* [1963] 1 QD 499. Counsel for the plaintiffs did in submission say that the leasing out of the said property had caused inconvenience, annoyance and uncertainty to the plaintiffs but none of the plaintiffs' witnesses gave any evidence to this effect. Accordingly, besides being unsupported by any evidence the submission of counsel also did not identify what tort had been committed by the defendants and therefore could not be acted on at all. It is therefore my finding that the plaintiffs' claim for exemplary damages fails. In so finding I do not wish to be seen as saying that in a contractual situation, a claim for exemplary damages will not lie; it may well do and the case of *Alfred Templeton & Ors v. Low Yat Holdings Sdn. Bhd. & Anor* [1989] 2 MLJ 204 is a good example of a case in which the plaintiffs' case was pleaded in contract and tort but their claim for exemplary damages was based on allegations of tortious wrongs committed against their property.

In conclusion there will be judgment for the plaintiffs in the following terms:

(a) that the defendants do deliver vacant possession of the said property to the plaintiffs;

(b) that the 1st defendant do pay to the plaintiffs the sum of RM68,331.94 as agreed and liquidated damages from 14 August 1994 till today together with interest thereon at 8% per annum from today till date of realisation;

(c) that until possession is so delivered the 1st defendant do pay to the plaintiffs the sum of RM35.06 a day from the date hereof together with interest thereon at 8% per annum;

(d) that the plaintiffs are entitled to set-off so much of the sum of RM68,331.94 and any further sum representing agreed and liquidated damages together with interest thereon against the the sum of RM70,400 payable to the 1st defendant as the balance of the purchase

price for the said property, as will satisfy the same and if any sum still remains due to the 1st defendant thereafter to pay the same upon delivery of possession of the said property; and

(e) Costs to the plaintiffs.